

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB JUNE 16, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Frederick's of Hollywood, Inc.

Serial No. 75/391,971

Serial No. 75/392,080

Jeffery H. Brown of D'Ancona & Pflaum LLC
for Frederick's of Hollywood, Inc.

Jill C. Alt, Trademark Examining Attorney, Law Office 114
(Mary Frances Bruce, Managing Attorney).

Before Quinn, Wendel and McLeod, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Frederick's of Hollywood, Inc. has filed applications
to register the marks CAPTIVATOR¹ and CAPTIVATOR II² for
"brassieres."

Registration has been finally refused in each
application under Section 2(d) of the Trademark Act on the

¹ Serial No. 75/391,971, filed November 18, 1997, claiming a date
of first use and first use in commerce of August 16, 1994.

Ser Nos. 75/391,971 and 75/392,080

ground of likelihood of confusion with the registered mark CAPTIVATORS, in the stylized form shown below, for "ladies' shoes made of leather, rubber, fabrics, plastic, and combinations thereof."³

Applicant and the Examining Attorney have filed briefs in each case, but no oral hearing was requested. Inasmuch as the cases involve common issues of law, we have found it in the interests of judicial economy to consolidate the cases for purposes of final hearing. This opinion is issued for both applications.

We make our determination of likelihood of confusion on the basis of those of the du Pont factors⁴ which are relevant under the circumstances at hand. Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being

² Serial No. 75/392,080, filed November 18, 1997, claiming a date of first use and first use in commerce of August 16, 1994.

³ Registration No. 418,722, issued January 8, 1946, second renewal.

⁴ See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Ser Nos. 75/391,971 and 75/392,080

used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Looking to the marks, the Examining Attorney maintains that applicant's marks CAPTIVATOR and CAPTIVATOR II are not only similar in appearance and sound to the registered mark CAPTIVATORS,⁵ but also have the same meaning and connotation. She argues that any difference created by the final "S" in registrant's mark is "legally negligible," and that the "II" in applicant's second mark appears to be merely a series indicator.

Applicant, on the other hand, argues that its marks create an entirely different commercial impression from the registered mark CAPTIVATORS, when applied to the goods involved. Applicant asserts that when CAPTIVATOR or CAPTIVATOR II is used with brassieres there is the connotation of something "alluring, enticing and sensual," whereas the mark CAPTIVATORS conveys no such meaning when used with shoes. Instead, according to applicant, registrant's mark is either entirely arbitrary or perhaps "suggestive of the shoe's ability to keep one's feet securely restrained." Applicant likens the present case to

⁵ We note that neither the Examining Attorney nor applicant has made any reference whatsoever to the stylized format of the registered mark. Accordingly, we assume for purposes of our decision that this stylization has been acknowledged to be of little or no trademark significance.

Ser Nos. 75/391,971 and 75/392,080

In re British Bulldog, Ltd., 224 USPQ 854 (TTAB 1984) or In re Sears, Roebuck and Co., 2 USPQ2d 1312 (TTAB 1987), cases in which the identical mark was found to have a different connotation and thus create a different commercial impression when applied to two different types of wearing apparel. Applicant also argues that although the pluralization of registrant's mark does not significantly differentiate the marks, the "II" is a prominent feature in applicant's second mark.

There is no question but that applicant's two marks, CAPTIVATOR and CAPTIVATOR II are very similar in appearance and sound to registrant's mark CAPTIVATORS. The pluralization in registrant's mark is of little significance in terms of likelihood of confusion. See In re Pix of America, Inc., 225 USPQ 691 (TTAB 1985). Similarly, we find little trademark significance in the additional "II" in applicant's second mark, since the most likely impression would be that this is an indicator of the second version or model of the CAPTIVATOR line.

Thus, the real issue is whether the connotation of the term CAPTIVATOR is changed such the mark creates a different commercial impression when used on brassieres as opposed to ladies' shoes. The Examining Attorney has made of record the dictionary definition of "captivate" as

Ser Nos. 75/391,971 and 75/392,080

meaning "to attract and hold by charm, beauty or excellence."⁶ She takes the position, with which we agree, that this meaning is equally as applicable to shoes as to brassieres. She states, "it is widely known that while there are men who are fascinated by women's breasts, there are others who are more fascinated by women's legs and/or feet." Thus, she maintains that "registrant very likely wished to imply to its prospective customers that its shoes would enhance the ladies' ability to attract and hold a man by their charm, beauty or excellence."

We find this line of reasoning most convincing. While applicant argues that the connotation of being "alluring, enticing and sensual" would only apply to its CAPTIVATOR brassieres, we agree with the Examining Attorney that ladies' shoes may well be described in similar terms. The commercial impression created by the CAPTIVATOR marks, whether used with brassieres or ladies' shoes, is the same. Cf. *In re British Bulldog, Ltd.*, *supra* [PLAYERS when used with shoes implies fit, style and durability adapted to outdoor activities whereas PLAYERS for men's underwear implies something else, primarily indoors in nature]; *In re Sears, Roebuck and Co.*, *supra* [CROSS-OVER when applied to

⁶ The American Heritage Dictionary of the English Language (3rd Ed. 1992).

Ser Nos. 75/391,971 and 75/392,080

bras is suggestive of construction of the bra whereas CROSSOVER as applied to ladies' sportswear is either arbitrary or suggestive of sportswear that "crosses over" the line between informal and more formal wear or the line between two seasons].

Turning to the goods, we note that, as a general principle, the greater the degree of similarity in the marks, the lesser is the degree of similarity that is required of the goods on which the marks are being used in order to support a holding of likelihood of confusion. If the marks are the same or almost so, it is only necessary for there to be a viable relationship between the goods. See *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

In the present case, the Examining Attorney argues that the mere fact that both brassieres and shoes are women's clothing articles is sufficient to establish a relationship between the goods. She sets forth as general knowledge the fact that "clothing lines have become extremely catholic in recent years, embracing all sorts of clothing that was once sold under differing trademarks, but is now rounded up under the same trademark." Thus, she concludes that "given the present state of the clothing industry with both established and neophyte fashion houses

Ser Nos. 75/391,971 and 75/392,080

selling everything from lingerie to hiking boots, brassieres and shoes for women are related goods."

Applicant strongly argues that there can be no "per se" rule as to the relationship of different items of wearing apparel; that brassieres and shoes are distinctly different in nature and are not companion or complementary items. Applicant also maintains that there is a basic difference in the selection of brassieres and shoes, brassieres being more of an "off the shelf" item whereas shoes normally require the assistance of a salesperson.

Along more specific aspects, applicant insists that consideration must be given to the differences in marketing and sales between applicant's brassieres and registrant's shoes; that applicant's CAPTIVATOR (or CAPTIVATOR II) brassieres are sold exclusively in applicant's own stores, its catalog and through its on-line shopping catalog, and never in general department stores or the like. Applicant adds that registrant's shoes would never be sold in applicant's stores or catalogs which are restricted to private label merchandise. Applicant contends that the presence of its house mark FREDERICK'S of HOLLYWOOD on the labels in conjunction with the CAPTIVATOR mark would be another mitigating factor against any confusion on the part of purchasers.

Ser Nos. 75/391,971 and 75/392,080

There are obvious differences between brassieres and ladies' shoes; they are not clothing items which would normally be viewed as complementary or companion items. Nonetheless, both are purchased by the same persons, namely, women, and perhaps on the same shopping trip, for use as essential components of their everyday wearing apparel. Whether or not sales assistance might be provided in the selection of either of the items does not appear to be a significant factor insofar as a viable relationship is concerned. In the past, both our reviewing court and the Board have found a sufficient relationship to exist between shoes and several other items of clothing, including brassieres, to support a likelihood of confusion when the same or similar marks are used therewith. See *General Shoe Corp. v Hollywood-Maxwell Co.*, 277 F.2d 169, 125 USPQ 443 (CCPA 1960)[identical mark *INGENUUE* for women's shoes and brassieres]; *In re Melville Corp.*, 18 USPQ2d 1387 (TTAB 1991)[*ESSENTIALS* (in script form) for women's shoes and *ESSENTIALS* for women's pants, blouses, shorts, and jackets]; *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984)[*BOOMERANG* for athletic shoes and *BOOMERANG* and design for men's shirts] and the several other cases listed therein. We can only conclude that in view of the present state of the clothing industry and the broad array of items

Ser Nos. 75/391,971 and 75/392,080

which may originate from a single source, which we believe the Examining Attorney has accurately described and a fact of which we might well take judicial notice, this previously recognized relationship between shoes and other clothing items would hold true for the brassieres of applicant.

While applicant has attempted to distinguish its goods on the basis of manner of marketing and sale, its arguments are to no avail. There is no restriction in either application as to the channels of trade in which the brassieres are sold. Thus, we must assume that the goods are being sold in all the normal channels of trade for goods of this nature to all the normal purchasers of these goods. See *In re Melville*, *supra* at 1388, and the cases cited therein. No line can be drawn between applicant's sales in its own retail outlets and registrant's sales elsewhere. Nor can applicant rely upon the fact that its house mark accompanies the CAPTIVATOR marks on the labels presently being used. Applicant is seeking to register the mark CAPTIVATOR or CAPTIVATOR II alone, and is in no way bound to continue use of these marks in conjunction with its house mark.

Applicant also argues that the sophistication and degree of care exercised by purchasers of these goods must

Ser Nos. 75/391,971 and 75/392,080

be taken into consideration. Applicant contends that both brassieres and shoes are not inexpensive items and are ones which require a proper fit. We agree with the Examining Attorney, however, that there are expensive brassieres and shoes and there are inexpensive ones; the choice is dependent upon the particular purchaser. While proper fit may be a criteria for selection of the goods, we fail to see any correlation between exercising care in obtaining the proper size and discerning between the marks used thereon. There simply is no evidence to suggest that these purchasers are any more sophisticated than purchasers of any other retail goods or of a higher level than ordinary consumers. See *In re Melville, supra* at 1388.

Finally, although applicant refers to a list of third-party registrations and applications for other CAPTIVATOR marks, these are for goods unrelated to the clothing field and thus are irrelevant to our determination herein. See *In re Melville, supra* at 1389.

Accordingly, in view of the high degree of similarity of the CAPTIVATOR marks of applicant and registrant and the relationship which has been found to exist between the clothing items upon which the marks are being used, we find confusion likely.

Ser Nos. 75/391,971 and 75/392,080

Decision: The refusal to register under Section 2(d)
is affirmed in each application.

T. J. Quinn

H. R. Wendel

L. K. McLeod
Administrative Trademark Judges,
Trademark Trial and Appeal Board